NO. 83-506

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

CONRADO VELA,
Respondent

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL APPENDICES

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. PALMER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas, 78711
(512) 475-3281

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CONRADO VELA	§	
	§	
V.	§	
	§	CA3-81-2022-R
	§	
W. J. ESTELLE,	§	
DIRECTOR, TDC	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED AND DECREED that the Petitioner's application be, and it is hereby, refused and dismissed.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this order and the order adopting the Findings, Conclusions and Recommendation of the United States Magistrate, to Petitioner and Respondent.

SIGNED AND ENTERED this 8th day of April, 1982.

/s/

UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CONRADO VELA	§	
	§	
V.	§	
	§	CA3-81-2022-R
	§	
W. J. ESTELLE,	§	
DIRECTOR, TDC	§	

ORDER

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate, I am of the opinion that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions and Recommendation of the United States Magistrate, are adopted.

SIGNED AND ENTERED this 8th day of April, 1982.

/s/

UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CONRADO VELA	§	
	§	
V.	§	CA3-81-2022-R
	§	
W. J. ESTELLE,	§	
DIRECTOR, TDC	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case:

This is a petition for habeas corpus relief filed by a State inmate pursuant to 28 U.S.C. §2254.

Parties:

Petitioner is confined as an inmate at the Ramsey Unit No. 1 of the Texas Department of Corrections at Otey, Texas, serving a conviction for the offense of murder.

Respondent is the Director of the Texas Department of Corrections.

Statement of the Case:

After the prosecution filed its written intention not to seek the death penalty (Record, Volume 1, page 11), the Petitioner entered a plea of guilty to the charge of murder pursuant to the indictment returned in Cause No. C-73-7226-JL after a jury had been impanelled to assess punishment. The prosecution and the Petitioner put on evidence during the punishment phase and the jury thereafter found the Petitioner guilty of murder with malice and assessed his punishment at a term of 99 years confinement in the Texas Department of Corrections. The Petitioner effected a direct appeal, and the Texas Court of Criminal Appeals affirmed the conviction in *Vela v. State*, 516 S.W.2d 177 (Tx.Crim.App. 1974). Petitioner has filed one subsequent application for habeas corpus relief in the courts of the State of Texas pursuant to Article 11.07, Texas Code of Criminal Procedure, which was denied by the Court of Criminal Appeals on June 4, 1980.

In his present application the Petitioner alleges that he was denied effective assistance of counsel in violation of the Sixth Amendment by reason of this trial attorney's failure to properly object to: (1) the testimony of the deceased's widow, Mrs. Carolyn Brown; (2) the testimony of Harvey Othel Martin; and (3) the prosecution's closing argument in the punishment phase of Petitioner's trial.

The Respondent has filed his Answer and Motion to Dismiss wherein he admits that the Petitioner has exhausted available State remedies.

Findings and Conclusions:

The present application must be viewed solely in context of the Petitioner's trial counsel's conduct since this is the only constitutional issue which has been presented

to the Texas State courts, and thus has satisfied the exhaustion prerequisite of §2254, although clearly in considering this issue counsel's conduct must be viewed in the context of the case as a whole.

Since the Petitioner has called into the question the conduct of his counsel during the course of the Petitioner's trial for murder, this court has carefully reviewed the entire trial proceedings, including the testimony of witnesses called by the prosecution as well as those called on behalf of the Petitioner. The evidence supporting the Petitioner's conviction is accurately set out in summary fashion in the Court of Criminal Appeals' opinion affirming the Petitioner's conviction. However, it is pertinent to make several additional observations on the conduct of the Petitioner's trial attorney. Initially it is observed that the State elected not to seek the death penalty for the homicide committed by the Petitioner. Further, during the course of cross examining the State's witnesses, counsel elicited testimony showing that the deceased's co-employee tried to dissuade the deceased from following the Petitioner's brother into the parking lot where the initial confrontation occurred (Statement of Facts, testimony of William Berry, page 59; 63). The attorney also established that the Petitioner was unarmed and was cooperative at the time of his arrest (Id, testimony of John Hester, pages 84-85). In the course of the Petitioner's case in chief his attorney called five witnesses in addition to the Petitioner himself. In the face of the uncontroverted testimony which precluded any theory of justifiable homicide, counsel attempted to show that the Petitioner enjoyed a good reputation for being a peaceable and law-abiding citizen. The Petitioner's witnesses also testified that the Petitioner had become extremely angry as a result of being struck by the decedent at the time of the initial altercation, and that his actions from that point forward resulted from his extreme anger. The Petitioner's mental state was presented in an effort to convince the jury that it should

limit its finding to murder without malice. The fact that counsel was unable to so persuade the jury does not undermine the fact that counsel presented Petitioner's case in the most favorable light possible.

It should also be observed that counsel elicited testimony tending to neutralize the possibility that any shots were fired shortly before the Petitioner's arrest was effected by showing that on the day prior to the Fourth of July children in the area were shooting off firecrackers.

The factual context on which the Petitioner's claims of ineffective assistance of counsel are predicated provided the factual bases for the Petitioner's points of error in his direct appeal. The record from Petitioner's trial reflects that the testimony of Mrs. Brown and Mr. Martin were not received without protest on the part of Petitioner's counsel. The record reflects that counsel sought a voir dire examination of each of these witnesses before their testimony was presented by the prosecution, and that on each occasion the trial judge denied the request (Statement of Facts, pages 122-123; 178-179). Further, in response to the prosecutor's argument which constitutes the third prong of the Petitioner's claim of ineffective assistance of counsel, the trial attorney asked for a mistrial (Id, page 254).

In its opinion affirming the Petitioner's conviction the Court of Criminal Appeals ruled that counsel's objections and motion for mistrial were insufficient to preserve error for appellate review. Therefore, the inquiry before this court is whether the three inartful attempts by the Petitioner's trial counsel to preserve error for appellate review rendered counsel's representation of Petitioner as a whole constitutionally infirm.

In assaying whether counsel's conduct falls below minimum constitutional standards, his actual perfor

mance, considered in the light of the totality of the circumstances in the case must be shown to have been seriously inadequate and that such inadequacy unduly and unfairly prejudiced Petitioner's trial to the extent that the trial as a whole was rendered "fundamentally unfair". *Boyd v. Estelle*, 661 F.2d 388 (5th Cir. 1981); *Washington v. Watkins*, 655 F.2d 1346, 1360 (5th Cir. 1981); *Nelson v.* Estelle, 642 F.2d 903, 906 (5th Cir. 1981). These inquiries are separate and distinct, and the Petitioner bears the burden of demonstrating both in order to be entitled to relief. A review of counsel's conduct as a whole demonstrates that but for these three isolated instances which the Petitioner now asserts, his trial attorney cross examined State witnesses in a competent manner, presented testimony in an effort to obtain a verdict of murder without malice and presented a reasonable and cogent argument on the Petitioner's behalf. Thus counsel's efforts as a whole strongly militate against a finding of a Sixth Amendment violation. The case decisions of the Fifth Circuit demonstrate that the court has been loathe to grant relief based upon isolated instances of error. See *Nelson v. Estelle*, supra, at page 906.

The decisional law of the Texas Court of Criminal Appeals has historically held that the State in the first instance may not offer evidence that the decedent was peaceable and inoffensive, nor may the State offer testimony concerning the decedent's marital status and personal history. See *Vela v. State*, supra, at pages 178-179 and cases cited therein. [1] With the exception of

---

1. Quite frankly this court has difficult in comprehending the policy reasons for such a rule of law where such evidence is presented in the punishment phase of trial. It seems to me imminently appropriate that the assessment of punishment should be made with knowledge of the circumstances of the killing and the background of both the decedant and the defendant. It cannot be denied that the Petitioner attempted and was permitted to put his

(footnote continued on following page)

the decision in *Arthur v. State*, 339 S.W.2d 538 (Tx.Crim.App. 1960), erroneous admission of evidence concerning the deceased's character has not mandated reversal of a conviction. E.g. *Cavarrubio v. State*, 267 S.W.2d 417 (Tx.Crim.App. 1954); *Whan v. State*, 438 S.W.2d 918, concurring opinion at page 924 (Tex.Crim.App. 1969). Thus, it is far from clear, unlike the error complained of in *Nero v. Blackburn*, 597 F.2d 991 (5th Cir. 1979), that even had counsel properly preserved error for appellate review on these grounds that such error would have been sufficient to obtain a reversal of his conviction.

Concerning the comments made by the prosecutor of which the Petitioner now complains (Statement of Facts, page 254, lines 2-7), although the Court of Criminal Appeals declined to consider the merits of such alleged error, it appears that no error occurred. In cases decided by the Texas Court of Criminal Appeals addressing the propriety of the prosecution's argument relative to the effect of a crime on victims or members of a victim's family, the conduct proscribed is the injection of matters which are not in the record. More particularly comments which have been found to be improper are those wherein the prosecutor sought to infer that a victim or his family "wished" a certain punishment to be imposed. In the context of the Petitioner's case the prosecutor's comments constituted nothing more than an articulation of facts which were known to the jurors, particularly in light of the fact that the decedant's wife had testified as a witness. Even if the comments of the prosecutor be considered to be erroneous, under Texas

---

(footnote continued from previous page)
"best foot forward" in the eyes of the jury, including his family background and past work history. Unless testimony concerning the deceased is presented under circumstances and in a manner wholly calculated to inflame the jury, it would seem that such evidence is also relevant to the jury's determination of a proper punishment.

State law they could hardly be said to mandate reversal in the face of other cases in which the Court of Criminal Appeals has held no reversible error occurred where far more blatant and inflamatory statements were made cured only by an instruction from the trial judge, e.g. *Culley v. State*, 505 S.W.2d 564 (Tx.Crim.App. 1974); *Cherry v. State*, 488 S.W.2d 744 (Tx.Crim.App. 1972) cert. den. 411 U.S. 909; *James v. State*, 240 S.W.2d 771 (Tx.Crim.App. 1951).

Taken as a whole Petitioner's trial attorney more than adequately represented the Petitioner. The isolated instances to which the Petitioner points are not of such magnitude to render counsel's conduct constitutionally infirm.

Alternatively, even if these cited actions of counsel can be said to be seriously inadequate under the Fifth Circuit's standards, the Petitioner cannot demonstrate that these inadequacies render the Petitioner's trial as a whole "fundamentally unfair". As further elaborated above, the evidence against the Petitioner was overwhelming. It is undoubtably for this reason that he entered a plea of guilty. Additionally, it is noted that the Petitioner himself admitted on cross examination that he anticipated that the jury would assess a life sentence (Statement of Facts, page 207). Although a term of 99 years is a very substantial sentence, in the face of evidence which established that the Petitioner shot at the decedant, who was unarmed at the time, approximately six or seven times, and struck the decedant with a fatal wound in the back, such a sentence is clearly not unjustified, particular in the light of the fact that during the same time period the Petitioner's criminal trial occurred it was not infrequent for Dallas County juries to assess punishment at terms of years in excess of 1000 years. E.g. *Culley v. State*, supra, wherein the punishment for murder with malice was set at a term of 3000 years imprisonment.

RECOMMENDATION

For the foregoing reasons it is recommended that the Petitioner's application be denied and dismissed.

/s/

UNITED STATES
DISTRICT JUDGE